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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

FRANCIS DENBY GHERINI, individually
and as Successor In Interest to
the Estate of Inez Gherini, deceased,
Petitioner,

v.

ROBERT J. LAGAMARSINO, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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March 20, 2008

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QUESTIONS PRESENTED FOR REVIEW

This Court's severe restriction of the "probate exception" in *Marshall v. Marshall, 547 U.S. 293 (2006)*, was followed by the Ninth Circuit Court of Appeals determining in this case, the District Court's application of the "probate exception" was not "valid," but still did not deprive that court of jurisdiction. The Circuit Court, however, did not remand, but instead, on alleged alternate grounds, determined Petitioner's alleged injury to property was not to "*his own*" property and therefore was a "derivative" injury not cognizable under RICO Section 1964(c) jurisdiction, and affirmed the District Court's prior dismissal with prejudice of all actions and all defendants, with the same *result* as if *Marshall* had never been decided. (*App. A*)

Accordingly, the following "questions" are presented:

1. Whether civil RICO actions under Section 1964(c) for monetary tort damages, are jurisdictionally "precluded" when brought by third parties, whose interests are "*derivative*," whether vicariously, as agents, or otherwise, of injury to "business or property" of another person or entity?

2. Whether, under *Marshall*, an action for Tortious Interference With Inheritance is a "*federal common law tort*" within federal subject matter jurisdiction, not subject to regulation or interference by state legislature or courts, and, if not, did the District Court have supplemental jurisdiction of this cause of action

Section 1367(a), so providing, and/or have "exclusive" jurisdiction under Section 1346, where, as here, the United States is a named party?

3. Whether, having first determined the "probate exception" did not "*deprive*" the District Court of subject matter jurisdiction, was the Circuit Court, thereby, *precluded* under the doctrines of "*res judicata*," and/or "*collateral estoppel*" from, instead of remanding for determination on the merits, making a new second ruling on the same operative facts in the same case with the same parties, determining that District Court "lacked standing" (subject matter jurisdiction)?

RULE 14.1(b) STATEMENT

A list of all the parties to this proceeding is as follows:

Francis Denby Gherini, individually
and as Successor In Interest to
the Estate of Inez Gherini, deceased
Petitioner

v.

Robert J. Lagomarsino; Stanley T. Allbright, individually; Edward Haberlin, individually, County of Santa Barbara; Roger Sullivan; Sullivan, Workman & Dee, a Law Firm; John Gherini, individually and as President, Santa Cruz Island Company; Tom Gherini, individually and as Executor of the Estate of Pier Gherini, deceased; Joy Ryan, individually; Charles Cummings; Andrea Gherini Gallant; Catherine Gherini Beauclair; Theodore England; David Shea; David Tredway; Ferguson, Case, Orr, Paterson & Cunningham, LLP; Michael R. Sment; Dean M. Ward; Paul Frimmer; Gherini Family Holdings, LLC.; Fred Roseamund; Oxnard Holding Company; Don L. Carlton, Inc; Steven Hintz, individually; Henry Walsh, individually; Arthur Gilbert, individually; Cohen, England & Whitfield; Marla Daily, individually and as Officer of Santa Cruz Island Foundation; Santa Cruz Island Company; The Nature Conservency; United States Department of Energy; Department of Justice; Department of Interior; Diane Elistrom Devine, individually; and as Officer of the Nature Conservancy; Federal Energy Regulatory Commission;

National Park Service (NPS); State of California; William H. Ehorn, individually and as Officer (NPS); Ventura County Superior Court; Andrea Seastrand, individually and as member of California State Assembly (1990-1994), and United States Congresswoman (1995-1997); Tim Setneka, individually, and as official (NPS); the United States of America; and Supervising Clerk, Fiscal Department, U. S. District Court of California Central Division,

Respondents

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PETITION FOR WRIT OF CERTIORARI

Petitioner Francis Denby Gherini, individually and as Successor In Interest to the Estate of Inez Gherini, deceased, respectfully petitions for a writ of certiorari to review the Memorandum Opinion, Judgment, and Order Denying Rehearing *en banc*, of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion, and Judgment of the United States Court of Appeals for the Ninth Circuit, *2007 U.S. App. LEXIS 26424*, sought to be reviewed was filed November 9, 2007 *(App. A)*. The Order Denying the Petition for Rehearing *en banc* was filed December 21, 2007 *(App. D)*. The Memorandum Opinion and Order of Dismissal of the U.S. District Court of California, Central Division, was entered March 22, 2005 *(App. C)*.

This Petition is timely filed, pursuant to *Rule 13(1), (3)*.

JURISDICTION

This Court has jurisdiction pursuant to *28 U.S.C. § 1254(1)*. The Court of Appeals had appellate jurisdiction pursuant to *28 U.S.C. § 1291*.

The United States District Court, Central District of California, Western Division, had jurisdiction [as alleged in the First Amended Complaint (FAC)] pursuant to *28 U.S.C. § 1331 (federal question); 18*

U.S.C. §§ 1964(c), 1962, 1961 (RICO); *28 U.S.C. § 1983 (Civil Rights Act); and 18 U.S.C. § 1503 (Obstruction of Justice);* Constitutional *torts (Bivens), under Fifth* and *Fourteenth Amendments, U.S. Constitution; 18 U.S.C. § 1367(a) (supplemental jurisdiction)* and, importantly, *28 U.S.C. § 1346(b)(2) (action against United States; vicarious liability and waiver of immunity).*

STATUTORY PROVISIONS INVOLVED

While all of the jurisdictional statutes above are relevant, of particular importance are: *Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964* (civil RICO) which provides in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 (racketeering activity)...may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains, and the costs of the suit, including a reasonable attorneys fee...,

and Section 1962 defines "Racketeering Activity" as listed in 1961, "predicate acts," and where, as here, the United States is a named party, 28 *U.S.C. § 1346(b)(2)* provides in relevant part:

> ...the District Court, concurrent with the Court of Claims, has:... *exclusive* jurisdiction of civil actions over claims against the United States, for money damages,...for injury or loss of property...caused by the negligent or wrongful

> act or omission of any employee of the government, while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act (occurred),

and Section 1367(a) provides in relevant part:

> Except as provided in subsections (b) and (c), or as provided otherwise by Federal statute, in any civil action, of which the district court shall have original jurisdiction, the district court shall have supplemental jurisdiction over all other claims that are so related to the claim in the action, within said original jurisdiction that they form part of the same case of controversy under Article III of the United States Constitution.

and Subsection (c) provides the

> District court may decline to exercise supplemental jurisdiction over a claim under subsection(a) if; (3) The District court has dismissed all claims over which it has original jurisdiction.

STATEMENT OF THE CASE

A. Nexus of Relevant Facts and Procedural History

1. Petitioner's Acquisition, by Inheritance, of a Vested Interest to Oil and Mineral Rights in the "Gherini Ranch."

Petitioner, Francis Denby Gherini, ("Denny"), age 66, is the only son of Francis Ambrose Gherini (Francis), who died April 22, 1999, and Inez Denby Gherini, (Inez), who followed in death on May 22, 1999. Francis and Inez married on November 8, 1941, and remained husband and wife until their deaths. On July 23, Francis and Inez had acquired, as community property, an undivided one fourth interest in tracts 6 and 7, on the east end of Santa Cruz Island, off the coast of California, consisting of some 6,200 acres, in fee simple, with oil and gas rights a part thereof, referred to as the "Gherini Ranch."

Shortly before their deaths in 1999, both parents had executed a "post nuptial agreement," confirming all of their property was, and always had been, "community property," regardless of any trusts or other documents to the contrary, and Inez Gherini, prior to her final surgery, had executed a "holographic" last will and testament, leaving substantial gifts outright to Petitioner, and the residual outright, free of any trusts, one third to each of her three children, Petitioner and his two sisters Andrea and Cathie, which created an Inheritance Expectancy in Petitioner to one third of the Gherini Ranch with oil and gas

rights. Upon the death of Francis, Inez Gherini, as surviving spouse, acquired the entire estate, and upon her death on May 22, 1999, the entire estate passed under her will to her three children, a one third interest therein passed by operation of law to Petitioner free of any trust or other documents. Petitioner then as of that date became vested in a one third interest in the Gherini Ranch, with a vested, undivided, one third interest, to the oil and gas, surface and subsurface, over the entire Gherini Ranch.

2. Nature, Title and Market Value of Oil and Gas Rights.

Ownership of land includes oil and gas, and they are assignable rights, the same as interests in the land itself, even the land is owned in fee simple. Traditionally the owners, even governments, lease their oil and gas to oil companies for production of the oil. The lessee then owns a separate interest in the oil and mineral rights, which is severable, and assignable and capable of qualified market value evaluation. When the oil is separated, it become personal property, and is treated in the law the same as other personal property.

Moreover, even where lessees "pool" their leases, the oil interest remains, and a non-consenting lessee of remaindermen may sue, *e.g.*, for a *pro rata* share of the pool. *Humble Oil & Roff Co. v. Martin, 298 F.2d 163 (8th Cir. 1991), cert. den'd 371 U.S. 825 (1962).*

B. First Amended Complaint

On learning of the forgoing facts, and the conversion of assets by defendants as alleged, Petitioner, on January 19, 2005, as plaintiff, individually, and as Successor in Interest to the Estate of Inez Gherini, deceased, filed a fifty two page First Amended Complaint (FAC) against the United States and some forty-two defendants, in the *United States District Court, Central District of California, Case No. 04-8247*, asserting, *inter alia*, jurisdiction, pursuant to 18 U.S.C. § 1964(c) (civil RICO) and 28 U.S.C. § 1331 (federal question).

In the FAC, petitioner alleged three causes of action, each *in personam*, against all defendants, alleging (1) a RICO action, with predicate acts, (2) Interference with Inheritance, and (3) a common count, all tort actions seeking monetary damages, for injury to Petitioner's Inheritance Expectancy, which, on his mother's death, became vested interest in the oil and gas rights in the Gherini Ranch. In addition, Petitioner alleged specific predicate act violations, as listed in Section 1961, 1962, of defendants, including official and public embezzlement, extortion, obstruction of justice, and constitutional violations, as part of the "nexus of operative facts," which were common to all causes of action, which were actions based in tort for money damages.

Of course, Petitioner included the standard RICO "boiler plate" allegation, as follows:

> ...each of the defendants acting individually, and as principals of the enterprise, conducted, managed, controlled and/or participated in the conduct of the enterprise affairs and in its acquisitions, directly or indirectly, through a pattern of racketeering activity, by predicate acts, commencing in early 1975 and continuing in related and continuous sequence, as recent as December of 2004, and beyond. Each of the defendants have used or invested their proceeds and acquisitions, in or to the establishment and operation of the enterprise, making acquisitions for the United States."

and that "as a direct and substantial result of the predicate act violations" plaintiff was damaged in a sum in excess of $550,000,000.

Plaintiff summarized the allegations, as follows:

> The central gist of the first amended complaint, is the serious allegation, the United States, through violation of RICO, by the defendants and each of them, Denny lost his inheritance, which is estimated to have been, $550,000,000, which sum should be trebled as required by RICO...His damages from loss of oil are still continuing, at least to one third of net oil production from the Santa Cruz island vicinity. The full extent and nature of his damages are therefore unknown and the full amount will be set forth when ascertained. His general damages, in any event exceed $550,000,000 which should be trebled. He has also suffered

> great emotional suffering and extreme humiliation by reason of the foregoing,...

In short, the FAC alleged a RICO action, resulting from criminal predicate acts of defendants, which directly ("by reason of") proximately caused injury to "*his*," vested interest, by inheritance, in oil and gas rights with definite definable and determinable money damages. "*His*" interest then was by inheritance expectancy from December 21, 1998, the date of his mother's "holographic" will, which, upon his mother's death, on May 22, 1999, a vested one third interest in the entire estate, including the oil rights, which, as of that moment, became, by *operation of law*, no longer an "expectancy," but became a "fully vested ownership" interest in real property. In short, the oil and mineral rights were "*his*," by inheritance, and vested in him, and those rights were "property" within RICO, which were injured "by reason of" direct and proximate injury from predicate acts of the defendant to a defined interest, a "*monetary tort injury to his vested inheritance of oil and gas rights, subsurface and surface, underlying the Gherini ranch.*"

C. Rule 12(b)(6) Motions to Dismiss

Without denying or controverting any allegations in the FAC, the defendants, represented by at least 8 separate attorneys, each representing different defendants, each attorney, at the entry stage, challenged the FAC by filing eight separate motions to dimiss under *Rule 12(b)(6)*, some under both *(b)(1)* and *(b)(6)*, and most with no designation other than "Motion to Dismiss." In the case of civil RICO actions

the motions generally seek dismissal, on "judicially created exceptions" and "limitations," designed to "preclude" RICO claimants from their constitutional right of access to the courts.

The distinction between a *Rule 12(b)(1)* and a *Rule 12(b)(6)* motion has many practical consequences, for the standard for dismissal under *(b)(1)* and *(b)(6)* is usually substantially identical, yet the difference is one between a jurisdictional bar of the action altogether, and, on the other hand, "*a failure to state a claim*," usually with permission to amend at least at the pleading stage.

Accordingly, in *Lerner v. Fleet Bank, NA, 318 F.3d 113 (2d Cir. 2003)*, the circuit court affirmed a dismissal of a RICO action, for lack of subject matter jurisdiction stating: "But we do so under *Rule 12(b)(6)* for failure to state a claim, rather than under *12(b)(1)*, as the district court did." That Court reversed the dismissal, and remanded, under *Rule 12 (b)(6)* for the district court's original subject matter jurisdiction was "still intact."

The defendants, in their motions, jointly and severally, raised defenses, most of which were affirmative defenses, to be raised in the answer, including (1) "probate exception," (2) "Rooker-Feldman," conflated with (3) *res judicata*, (4) immunities (judicial, legislative and executive), (5) time limitations (binding state probate court determinations), (6) lack of "standing," and (7) failure to state a cause of action–all "preclusionary"and all as alleged attacks on the subject matter jurisdiction of

the District Court and all refuted in Petitioner's consolidated Opposition.

The District Court, Honorable A. Howard Matz, Judge, took judicial notice of the documents in a state probate action, which he took as true, and used those documents to support his subsequent ruling (*App. C),* applying the "probate exception," even though the allegations therein did not appear to contradict any of the allegations in the FAC and were "hotly" contested, dismissed the entire action, all causes, and all parties, with prejudice, even those defendants concerned only with the oil and gas RICO, and having nothing whatever to do with any probate proceedings.

Accepting the allegations in the Statement of Decision as true, was, of course, prejudicial error. As observed in *Wallace v. BCS Insurance Co., 2006 U.S. Dist. LEXIS 2735 (Cal D.C., January 14, 2008),* following and quoting from *Lee v. City of Los Angeles, 250 F.3d 688, 689 (9th Cir. 2001)*:

> While, on a Rule 12 (b)(6) motion to dismiss, the court may of course take judicial notice of another courts opinion, a matter of public record, it may do so "not for the truth of the facts asserted therein, but for the existence of the opinion, which, is not subject to reasonable dispute over its authenticity."

D. District Court Opinion and Dismissal

Although the District Court noted the FAC alleged three causes of action, the District Court "construed"

the entire FAC, as "one" brought pursuant to RICO. (*App. C*) ignoring altogether the second and third causes of action, and jurisdictional basis in addition to RICO, alleged in the FAC. In fact, however, the District Court abandoned any determination or reference to RICO altogether. Instead, the District Court, relying heavily on documents judicially noticed, found the action barred by the "probate exception" (*App. C*), and entered a judgment dismissed therefore lacking "subject matter jurisdiction." The District Court then entered its judgment, dismissing the entire FAC, all defendants, even those having nothing whatever to do with any probate actions, all causes of actions "with prejudice."(*App. B*).

Accepting the out of court judicially noticed as true violated Cal. Prob. Code § 16442, FRCP Rule 56, as explained in *Wallace v. BCS Insurance Co., 2006 U.S. Dist. LEXIS 2735 (Jan. 14, 2008)*, where the court held that while on a Rule 12 motion to dismiss the court may take judicial notice of another court's opinion, it may do so, not for the truth of the facts asserted therein, but for the existence of the opinion, which, is not subject to reasonable dispute over its authenticity.

In making is decision, the District Court relied almost exclusively on *In re Marshall, 392 F.3d 1118 (9th Cir. 2004)*, [which was *reversed* by this Court in *Marshall v. Marshall, 547 U.S. 293 (2006)* [the infamous "Anna Nicole" case)].

The District Court, then, on April 13, 2005, entered its "Judgment of Dismissal" of *all* claims, *all*

defendants, and the action, with prejudice (*App. B, "Judgment of Dismissal of All"*).

E. Ninth Circuit Court of Appeals Opinion

While appeal to the United States Court of Appeals for the Ninth Circuit was pending, that court noted the Supreme Court had granted certiorari in *In re Marshall, 392 F.3d 118 (9th Cir. 2004),* the very case so heavily relied on by the District Court in this appeal which involved a "Tortious Interference with Inheritance" claim, similar to the one in this appeal. The Ninth Circuit therefore "stayed" all further briefing in this appeal, pending determination by this Court, which handed down its decision, severely *restricting, if not eliminating the "probate exception," and reversing In re Marshall, supra,* and remanding.

Following the decision in *Marshall, supra,* the Ninth Circuit in this appeal issued its opinion that:

> Gherini's [Petitioner's] first amended complaint asserts RICO and tort claims and seeks an *in personam* damages judgment ... Therefore (*per Marshall, supra*), the "probate exception" deprive district court of subject matter jurisdiction over Gherini's claims.

The court, however, did not at this point, remand for determination of the remaining claims on the merits, as this Court did in *Marshall, supra.* Instead, interestingly, the Ninth Circuit used the phrase, "does not 'deprive' lower court of jurisdiction." Obviously, the Ninth Circuit was reluctant to undermine a ruling of

its own circuit in the *Marshall* case, but was using this method to achieve the same result, by the new ruling, adding a new and different amorphous requirement to "standing" by emphasizing "his" was not the same as "his own," as follows:

> Because he never had a property interest in the Gherini Ranch, Gherini was not injured in "*his own*" business or property by reason of a RICO violation. 18 U.S.C., Sec. 1964...

Of course the statutory use of the term is as "his" property; nevertheless the Ninth Circuit received that phrase add-in "own" to "his Own," from which the Ninth Circuit was precluding derivative claims, from RICO jurisprudence, by its addition to the word of the statute.

In short 'his' is different than "his own," the latter confining to petition, requiring the injury, even Petitioner's injury could not be "derivative" of injury to some other person or entity, a severe modification of the proximate cause requirements set forth in *Holmes*, *supra*.

Initially, the Ninth Circuit directly contradicted the express contrary allegations in the FAC, and its determination that, following *Marshall*, the District Court was not "deprived" of jurisdiction, in the same decision on the same operative facts, with the same parties, not contradicted itself, holding on its new basis, "lack of standing," the District Court lacked subject matter jurisdiction; directly conflicting rulings on subject matter jurisdiction in the same opinion.

This the Ninth Circuit could not do, for the new ruling was barred by *res judicata* and collateral estoppel doctrines. It has been held that civil RICO claims arising out of the "same nucleus of operative facts" as prior claims were barred by *res judicata. Isreal Discount Bank v. Entin, 951 F.2d 311 (11th Cir. 1991),* and further such claims could not be used to decline supplemental jurisdiction, [as was done in this case, an express ruling in the opinion] *Corwin v. Marney Orton Inv., 843 F.2d 194 (5th Cir. 1988).*

The error is illustrated in *Lerner v. Fleet Bank, N.A., 318 F.3d 113 (2d Cir. 2003),* where the court initially held that district court's determination of "lack of subject matter jurisdiction" was correct, and then, in the same case, held the district court should have dismissed the RICO claim for failure to state a claim, because a determination of lack of "standing" under RICO was not jurisdictional, and the failure to plead proximate cause did not divest the district court of original jurisdiction.

Without any citation to the record, other than to change the term in the statue of "his own," directly contradicted the allegation in the FAC, in violation of the mandated presumptions of truth of the pleading in Rule 12 motions, to determine, (1) Petitioner never had a property interest in the Gherini ranch, and (2) alleged no injury to "*his own*" property. Unfortunately the court gave no definitions or explanations of the terms "his" and "property," nor any identification of anything in the record to support its factual determination other than the FAC, nor could it without complying with Rule 56. Having first

determined the FAC alleged civil RIC0 and tort actions for "*in personam*" damages for the injury to the oil rights, necessarily determined that the FAC alleged a RICO and tort action for "injury," a damages judgment, and further that injury was to oil rights as alleged. The only change was to determine that the injury was not to Petitioner's interests, which necessarily required a determination that the injury was to some other person or entity, who was left identified by the court.

Yet the court, based on this illogical reasoning, made a determination not only depriving Petitioner of over one half a billion dollars in oil revenues, and set precedent for the preclusion of all "derivative claims" under RICO, but finally to use this specious circuitous reasoning and procedure, the court now, instead of remanding as it should have, elected to "affirm" the District Court's original jurisdiction, and dismissal, the same as if the court had never decided *Marshall*, *supra*.

Moreover, since Petitioner had alleged an interest in oil and mineral rights, and that they were his "inheritance expectancy," the court must have been concluding such an interest was not cognizable as a "*property*" within RICO 1964() jurisdiction, for an interest by inheritance, vested or otherwise, in oil and mineral rights, is not "property" within protection of RICO 1964(c)for it's a *derivative* claim, and that any claim of injury derivative of injury to some other person or entity, "precluded," as not cognizable under 1964(c).

Additionally the District Court wrongfully declined to exercise supplemental jurisdiction of the second and third causes of action, erroneously characterizing them as "state law" actions.

Of course the Circuit Court did, in fact, have supplemental jurisdiction as provided in *Section 1367(a).* This court observed in *Exxon Mobil Corp. v. Allapattcah Services, Inc., 546 U.S. 546, 577 (2005), that l367(a) for supplemental jurisdiction, "...over all claims that are so related to claims in the action, within and original jurisdiction that they form a part of the same case of controversy under Article III of the U.S. Constitution." Moreover, the discretion in the excepted subsection c, for the District Court to nevertheless deny supplemental jurisdiction, is by its terms inapplicable to this case, all on the same facts as defined in 1367(a).*

Justice Ginsburg, in *Exxon Mobil Corp. v. Allapattcah Services Inc, 546 U.S. 546, 577 (2005),* observed, "This court is unanimous in reading 1367(a) to permit pendent-party jurisdiction in federal questions cases ..."

In the present case on this petition, the whole issue of supplemental jurisdiction is moot, for the second and third causes, were not "*state law*" claims, but were directly alleged federal common law tort claims, completely cognizable in federal courts.

Once again, in the same decision, the Ninth Court was disregarding the precise holding in *Marshall, supra,* where Justice Ginsburg forcibly decreed, relying

on Restatement of Torts, Second, § 774(b), that "Interference with Inheritance" was, in fact, a federal common law tort, over which the district court had complete subject matter jurisdiction, which was not subject to state law, legislature, courts or any other interference or limitation by stating:

> ...At issue here...is not the ...probate courts jurisdiction, but the federal courts jurisdiction to entertain.. . tortious inference claims. Under our federal system, ...(stat) cannot render its Courts exclusively competent to entertain a claim of that genre. We therefore hold the District Court properly asserted jurisdiction over..(the) claim...jurisdiction of the federal courts 'having existed from the beginning of the Federal government, can not be impaired by subsequent state legislation creating courts of probate.

To the extent the Ninth Circuit has added a requirement to RICO 1964(c), that a claimant's interest in property may not be *derivative* in nature, of an injury to third persons or entity, the case, if left standing, can arguably be used as precedent to eliminate **all** third party *derivative* claims, and importantly all expectancy type claims from RICO jurisprudence, affecting thousands of injured claimants and severely restricting and "limiting" RICO jurisdiction, rendering the entire RICO statute subject to uncertainty, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, as presaged by Justice Thomas, dissenting in *Anza*, *supra*.

Nevertheless, Petitioner's Motion for Reconsideration *en banc*, on the basis of conflict with its own *en banc* decision, was denied on December 21, 2007. (*App. D*).

REASONS FOR GRANTING THE PETITION

A. The Problem: "Federalization" vs. "Preclusion"

Justice Ginsburg, writing for the court in *Marshall v. Marshall, 547 U.S. 293 (2006)*, severely restricted the "probate" exception, noting is had been described as "an exercise in "mythography," quoted Chief Justice Marshall's famous admonition in *Cohen v. Virginia, 6 Wheat. 264, 404 (1821)*, that "We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given."

In *Marshall*, this Court was once more confirming its commendable policy of "federalization" by adherence to the congressional mandated "rule of liberal construction"[1] of RICO provisions to accomplish its remedial purpose, and of strict limitation and frequent abolishment, of judicially created exceptions and statutory "limitations" by lower courts, to restrict

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[1] The "liberal construction rule" underpinning the federalization policy was announced in *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)*, the seminal decision in RICO jurisprudence, in which the term "federalization" was used in Justice Marshall's dissent, referring to the majority opinion, "...validates the '*federalization*' of broad areas of state common law, and approves 'displacement' of remedial provisions...."

and prohibit actions brought pursuant to the "civil RICO," 1964(c) statute, a policy of "*preclusion*," prevalent in the lower courts.

Indeed, the lower federal courts frequently used interpretation of statutory entitlement provisions, as "limitations," combined with "judicially created" non statutory "exceptions" doctrines to advance a policy of "preclusion" of RICO subject matter jurisprudence, with attendant dismissal of RICO actions, directly contrary to the "*federalization*" policies of this Court.

In forwarding its "*federalization*" policies, this Court has directed that the "plain language" of a statute controls its construction, in absence of "clear evidence of a clearly expressed legislative intention to the contrary." *Bread Political Action Committee v. FED, 455 U.S. 577, 581 (1982)*, cited in *Walter v. Drayton, 496 F. Supp. 2d 1162 (D. Haw. 2007)*, explaining the "plain language" of the statute, with the liberal construction rules was sufficient to sustain RICO jurisdiction in any case where a predicate act violation was announced.

The "liberal construction" federalization policies were declared especially applicable to RICO actions, for in *Sedima, supra fn. 1*, the court forcibly proclaimed, "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in 1964(c), where RICO's remedial purposes are most evident." (*Sedima, at p.491, supra, fn 1*). The rule was supplemented by the rule of statutory construction, observed in *Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)*, that, "...when Congress does not rank a

statutory limitation on coverage as jurisdictional, courts should then treat the restriction as non-jurisdictional in character," which the court described as a "readily administrable bright line" in RICO determinations.

Yet, subsequently, in *Holmes v. Securities Investor Protection, 503 U.S. 258, 68 (1992)*, this Court engrossed the RICO statute with an additional jurisdictionally created concept of "proximate cause," justified as a manifestation of the terms "by reason of" in the statute, as a congressionally required limitation of RICO actions, which the majority attempted to clarify, by imposing a new test of direct/indirect as causation.

The ambiguities inherent in either term, "proximate cause" and/or "direct/indirect," lead to utter confusion, demonstrated by the failed attempt to further clarify, announced by this Court in *Anza v. Ideal Steel, 547 U.S. 45 (2006).* In fact in *Anza,* the court arrived at an almost unintelligible policy based construction of proximate cause, leading the dissent to suggest:

> No constitutional challenge to this law has been raised in the present case...That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Conversely, the lower federal courts, now shielded their jurisdictional determinations under the

non-statutory judicially created term *"standing,"* actually used as a synonym for subject matter jurisdiction, a term itself ambiguous. One case has suggested that "standing" sometimes express merely core components of the "Case or Controversy" requirement of Article III. Confining "standing" to Article III cases eases distinguishing "federalization" from mere entitlement requirements listed in the statute.

The courts are divided as to whether "standing" is a jurisdictional requirement, or a non jurisdiction eligibility requirement. In *National Organization of Women, Inc., v. Scheidler, 510 U.S. 249 (1984)* the court held "standing" to be a jurisdictional requirement, yet in *Denney v. Deutsche AG, 443 F.3d 253, 266 (2d Cir. 2006)* the court held "standing" was not a jurisdictional requirement, citing *Lerner v. Fleet Bank, 318 F.3d 113 (2d Cir. 2003)* holding that the absence of standing, based upon a lack of "proximate cause" was not a jurisdictional deficit, but a mere failure to state a claim under Rule 12(b)(6).

In short, while there are distinctions between RICO "standing" and the requirement of "proximate" cause, including that the former is jurisdictional while the latter is a merits issue, both are derived from the same statutory "by reason or" terminology in the statute.

The inherent ambiguities in use of "amorphous" requirements of "standing" or "proximate cause" has led this Court to almost uniformly strike down any judicially created non-statutory "exception," reversing decisions so based, in a clear trend over the last years,

as demonstrated in *Marshall*, where this court condemned the practice, stating, "...no warrant from Congress, or from this Courts decisions, for its sweeping extention of the probate exception."

As incisively clarified by Justice Ginsburg in Arbaugh v. Y & H Corp., 546 U.S. 500 (2006), the problems demonstrated in this appeal, is:

> On the subject-matter jurisdiction/ingredient-of -claim-for-relief dichotomy, this Court, and others have been less than meticulous. "Subject matter jurisdiction in federal-question determination cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief,-a merits-related determination. Judicial opinions, often obscure the issue by stating that the court is dimissing for lack of jurisdiction, when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction, or for failure to state a claim...We have described such unrefined dispositions as *'drive-by jurisdictional rulings'* that should be accorded no precedential effect on the questions whether the federal court had authority to adjudicate the claim in suit. Steel Co., 23 U.S. at 91." (*emp.add.*)

Surely if Congress had wanted to eliminate all derivative claimants from RICO jurisprudence, it knew how to do so. Since it has not, the requirement of this

Court, as shown, where there is no statutory limitation of jurisdiction, requires that the jurisdiction be sustained.

The lack of definition of "*his*," and other terms, renders terms amorphous, without definable structure, leaving open the possibility for courts to promulgate different interpretations of the statutes, which deficiency was seized by the lower courts. By, in an almost deliberate defiance of this Court's policies. In the present case, the Ninth Circuit's determination, is a perfect illustration of the use of "standing" and "proximate cause" to circumvent a ruling of this Court, and achieve the same result in this case as if *Marshall* had never been decided, all in the same opinion, in the same case, on the same operative facts and same causes of action between the same parties, without support in the record, and without clear explanation.

B. The Ninth Circuit has Decided an Important Federal Question In a Way that Conflicts With, not only Relevant Decisions of other Circuits, but With Relevant Policies and Decisions of this Court.

1. Conflicts with Policies and Decisions of this Court and Congress.

By adding an additional "amorphous" requirement, distinguishing RICO claims for injury to person or property that are "derivative" of some injury to other persons or entities, the Ninth Circuit acted in direct conflict with, and actually undermined, the "federalization" policies of this Court, escaped any

involvement with the oil conspiracy issue of national importance, and left Petitioner with no remedy for loss of his interest in oil rights, to his monetary damages in excess of $550,000,000.

Had the Ninth Circuit declared its requirement to be non-jurisdictional, by a mere eligibility issue, -a factual on the merits issue,- the matter would have been presented to a jury, where the facts could be openly resolved in a manner to assure judicial integrity.

Almost every interest is "*derivative*," in the sense of a distinction between legal and beneficial title, a concept likely itself, "derived" from mediaeval distinction between law and equity.... Even in real estate, a fee simple title is "derived" from the State, the sovereign. Likewise, as previously shown, interests in oil rights are necessarily "derivative" of the land, at least until severed from the land where capable of separate ownership. Necessarily then, all interests in land, not capable of being completely severed, remain "derivative" of the land.

Failure to recognize the distinction, especially by lower courts generating "preclusionist" rulings, explains the lack of clarity of decisions in RICO subject matter jurisprudence.

The tendency of lower courts, and the Ninth Circuit in the present case, to continue a "*preclusion*" doctrine completely undermines this Courts "*federalization*" policies, which are designed to promote the "liberal construction" of RICO remedies, and, primarily, to

secure uniformity as required by the United States Constitution. Continued engrafting of judicially construed "exceptions" is likely to be found, when challenged to be in violation of due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

2. *Intra*-Circuit Conflicts; *Diaz v. Gates*.

As shown, the Ninth Circuit by first determining the District Court retained subject matter jurisdiction even after *Marshall*, and then ruling it did not, because of its second ruling of "lack of standing," indicates the Ninth Circuit managed to make conflicting rulings in the same case on the same operative facts, in the same decision. In short, the Court conflicted with itself.

More importantly in eliminating "derivative" claims from RICO jurisdiction, the Ninth Circuit acted in direct conflict and disregard of, not only this Court's decisions, but in conflict and disregard of its own declared policy to the contrary as clearly declared *en banc*, just four months earlier.

In an admirable attempt to clarify and eliminate conflicting decisions in its own circuit, in the area of RICO jurisprudence, the Ninth Circuit, took *en banc* the appeal in *Diaz v. Gates, 420 F.3d 897 (9th Cir. 2005), cert. den'd, by Parks v. Diaz, 2006 U.S. Lexis 227 (U.S. Jan. 9, 2006)*, where the plaintiff sued defendant police officer and others, in a RICO action, alleging wrongful incarceration resulting in injury by loss of employment opportunities, clearly a "derivative"

interest, enunciated by the court as intentional interference with contract and interference with prospective business relations, which the court held to be cognizable as RICO actions.

The case was heard *en banc*, because of conflicting decisions in the Ninth Circuit as to whether "lost employment opportunities," a clearly "derivative" injury, was "property" within the civil RICO statute, 1964(c). In its ruling the *Diaz* court determined: 1. Legal entitlement to business relations, unhampered by schemes prohibited by the predicate statute of RICO is a "property interest" sufficient to provide standing under RICO; 2. Only entitlement requirement of 1964(c), is a person injured in his business or property by reason of a predicate act listed in section 1962, and defined in section 1861.

The *Diaz* court noted this Court, in *Holmes*, *supra*, has stated "'by reason of' in the statute incorporates a 'proximate cause' standard..." which is generous enough to include the unintended, though foreseeable consequence of a RICO predicate act violation.

In a clear statement of the federalization policy, Justice Kleinfeld concurring, in *Diaz*, stated:

> ...There is no room in the statutory language for an additional amorphous racketeering injury requirement. .. There is similarly no room in the statutory language for an additional amorphous requirement that for an injury to be to business or property, the business or property interest have been the "direct target" of the predicate

> acts. The statute is broad, but that is the statute we have.

In a like clear statement of the "plain meaning" requirement of statutory construction, Justice Klienfeld continued:

> Here is the plain and express logic of the statute; section 1964 establishes a civil cause of action for a violation of section 1962; (2) section 1962 uses a term of art defined in section 1961 to denote violations; (3) section 1961 expressly provides that various personal injuries, as well as other kinds of wrongdoing, constitute the misconduct giving rise to a cause of action. I see no way around this plain language of the statute...

The *Diaz* court also observed there is no distinction separating derivative injuries or property from RICO. The three-judge panel had tried to distinguish *Mendoza* v *Zirkle Fruit Co., 301 F.3d 1163, 1168 (9th Cir. 2002)*, on the theory that the farm workers loss of wage was the "direct target" of the conspiracy, while *Diaz's* injury was "merely derived from," and a "secondary effect of his false imprisonment."

The court quickly dispatched this argument, *eliminating both direct and derivative requirements or "exceptions"* on the basis they, *"founder"* on the language of the statutes, noting the only requirement for RICO standing is that one be a "person injured in his business or property by reason of a violation of Section 1962."

Diaz has been followed in *Guerrero* v. *Gates, 442 F.3d 697(2006),* and most recently in *Newcal Indus. v. Ikon Office Solutions, 513 F.3d 1038 (Jan. 2008),* where the Ninth Circuit, reversed a district court ruling that *"threat of suit"*was not a compensable injury under RICO 1964, as "speculative" in nature.

The *Newcal* court, noting that since the district court issued its order, the Ninth Circuit, sitting *en banc, in Diaz v. Gates, supra,* overturned the rules on which the district court relied. Since the district court had not had the oppotunity to consider *Diaz*, the *Newcal* court reversed and remanded for reconsideration of the compensable injury requirement under *Diaz*.

By so ruling, the *Newcal* court clearly established that the *Diaz en banc* decision was the controlling position of the Ninth Circuit, and set precedent for remand of any district court jurisdictional rulings in RICO cases which had not considered *Diaz*. Nevertheless, the Ninth Circuit in the present case directly contradicted the *Diaz* decision, of which perhaps the District Court, but clearly not the Ninth Circuit, were unaware, and nevertheless added "exceptions" and "limitations" to RICO subject matter jurisdiction, instead of remanding for reconsideration on the merits, as was done in both *Marshall, supra,* and the *Newcal* court.

3. Conflict with Relevant Inter Circuit Decisions.

The Ninth Circuit decision in this case, not only conflicts with the controlling Ninth Circuit *en banc* decision in *Diaz v. Gates*, but conflicts with decisions in other circuits, which were in turn in conflict with *Diaz*. The *Diaz* decision was sharply criticized by the Seventh Circuit, in *Evans v. City of Chicago, 434 F.3d 9016 (7th Cir. 2006)*, more in line with the decision in this case, held actions in tort, by third parties are "quintessential pecuniary losses," "*derivative*" of personal injuries arising under tort law, and were "indirect," secondary effects of personal injuries, not cognizable under RICO 1964(c) in *National Organization for Women, Inc. v. Scheidler, 519 U.S. 249 (1944)*, and on this basis denied leave to amend.

The *Evans* court summarily dispatched the Ninth Circuit ruling in *Diaz, supra* as "*equal parts mischaracterization of the RICO statute, and red herring.*" *Id. at 931*, an unsurpassed illustration of **conflict** between the Circuits.

The reference to state law for determination of the nature of the tort, as in *Diaz,* presented another conflict. The *Evans* court cited *Doe v. Roe, 958 F.2d 763 (7th Cir. 1992)*, however noting that while such was generally a question of state law, the congressional intention could *trump* a state law interpretation of property for 1964(c) purposes, stating "we are not required to adopt a state interpretation of "business or property" if it would contravene Congress' intent in enacting RICO, citing *Reconstruction Finance*

Corp v. Beaver County, 328 U.S. 201, 209-10 (1946). Also the *Marshall* court had determined "interference with inheritance" was a "federal" common law tort, and the state could not dictate anything whatever with reference to it. Perhaps this is the process of "*federalization*" of state law actions, so prevalent in decisions of this Court.

However *Diaz* survived the *Evans* ruling, in *Newcal Industries, Inc. v. Ikon Office Solutions* (a Ninth Circuit decision, entered January 23, 2008), *2008 App. LEXIS 1257*, where the court *reversed a Rule 12* dismissal because certain proximate cause elements required factual development. The *Newcal* court stated that the district court remand would settle the legal relations in issues, namely IKONS' legal right to recover from Newcal for "tortious interference, and would "afford relief from the uncertainty faced by the parties,... uncertainty as to the legal validity of IKON'S interference claim..., observing that even "the threat of litigation" is a cognizable injury for standing purposes," a clear recognition of a derivative interest *post Evans*.

Newcal was followed in *Pa. Ave. Funds v. Borey (DC Wash, Jan. 23, 2008), 2008 U.S. App. LEXIS 1257.*

Presaging the present appeal, one author noted, "it would seem resolution of this conflict is 'destined for the Supreme Court'. *Grell, RICO In A Nutshell; RICO:ACT.com, LLC (2007).*

The decision in *Mendoza x. Zirkle,301 F.3d 1163 (6th Cir. 2000)*, referred to a case in which the court sustained an action brought by an heir for tortious interference with her inheritance, against defendants accused of "looting" the estate of her grandmother, thereby *diminishing* her inheritance.

Perhaps decisions dealing with the tort of "Interference with Inheritance" as alleged in the second cause of action in the FAC, but not considered by either the District Court or the Ninth Circuit, best illustrate the conflict over "derivative" claims for inheritance, as well as other expectancies which are clearly derivative in nature, considering such claims, obviously "derivative" in nature.

Importantly , the court in *Humble Oil & Roff Co. v. Martin, 298 F.2d 163 (5th Cir. 1961)*, on facts quite similar to the present case, involved a decision where an heir vested with a 1/30 interest in land, recovered monetary damages from a lessee for removal of oil from the land, clearly a "derivative interest" the same as alleged in this case. Again in *Mendoza v. Zirkle, supra*, a case in which the court sustained an action brought by an heir for tortious interference with her inheritance, against decedent accused of "looting" the estate of her grandmother, thereby "*diminishing her inheritance expectancy*, another example of recovery of a "*derivative*" property interest.

In *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 670 (11th Cir. 1998)*, the court sustained the right of "*potential* personal representative estate beneficiaries to file a RICO action against defendants

who "plundered estate assets, determining "diminishment of an estate" is an injury. That court noted *C. Wright, A. Miller & Cooper Federal Practice and Procedure, Sec. 3531*, noting the doctrine of "capacity" is often considered under the rubric of a standing claims...,the capacity doctrine relates to the issue of a party's personal right to litigate in a federal court.

In *Firestone v. Galbreath, 25 F.2d 323 (6th Cir. 1994)*, the court held that plaintiff grandchildren were residual trust beneficiaries, as opposed to vested beneficiaries of a fully funded trust, but could still bring an action.

More recently the 7th Circuit held the contrary in *Storm v. Storm, 328 F.3d 941 (7th Cir. 2003)*, a tort action which involved the terms of a trust, and was not a will contest. The court on review held the action barred by the probate exception even while recognizing an inheritance expectancy action could be brought in a court of general jurisdiction.

Yet in *Hoffman v. Sumner (D.C. Ill. 2006), 2006 U.S. Dist. LEXIS 35887*, where a Hoffman widow and executor of the estate, filed action alleging that she and Hoffman owned all the share of common stock of their corporation as joint tenants, and upon his death, she became sole owner of all the stock in the corporation. Subsequently defendants contacted plaintiff and notified them that they had a copy of an executed buy and sell agreement, signed by the deceased, providing she and two defendants each

owned a third of the stock. The court denied a petition to remand to the state court, but importantly observed:

> The Supreme Court's decision in *Marshall* appears to overrule the Seventh Circuit decision in *Storm v. Storm, 328 F.3d 941 (7th Cir. 2003)*, upon which plaintiffs rely. In that case the Seventh Circuit applied the probate exception to bar federal jurisdiction over a tortious interference claim, the very claim that the Supreme Court in *Marshall* determined was not barred by the probate exception.

But most importantly, a decision directly on point, and almost identical to the present case on appeal, is *At The Airport v. Isada LLC (D.C. NY 2006), 438 F. Supp. 2d 55, 2006*, where the plaintiffs brought RICO actions alleging defendants operated a scheme under which they "diverted the assets" of the LLC in violation of RICO, and also asserted state law claims. The defendant filed 12(b)(6) motions to dismiss. Plaintiffs had alleged defendant fraudulently diverted the LLC assets, that the defendant's conduct "deprived them of its proper share of revenue and violated RIC0 Section 1962(b). Defendant contended the court lacked standing because the injury was an indirect result of the racketeering activity. The court determined the LLC was the primary injured party, and that the "diminution in value of the members investment in the LLC was a "derivative' injury," and that the diminution in value was a derivative injury. While the general rule was against it, indirect standing actions be dismissed in favor of an action brought derivatively on behalf of the LLC, concluding that the "not allowing

the member to amend, because the *question of whether the member could sue derivatively on behalf of the LLC was unsettled*"!

As illustrated from the foregoing, the Circuits and the Ninth Circuit are in complete conflict disarray, and uncertainty regarding viability of derivative claims in RICO actions.

THE IMPORTANCE OF THE QUESTION

The present alleged RICO oil conspiracy, concerning public embezzlement and extortion, has to be a prime example of the type of enterprise for which RICO was aimed. Petitioner has asserted:

> ...the central gist of the FAC was the serious allegation, the United States, through its departments and agents with the private defendants, embezzled and extorted, in violation of RICO and the U.S. Constitution, almost the entire oil reserves off the Santa Barbara/ Ventura geologic oil basis, and surround three mile offshore limits of, not just the Channel Island, but the Continental coast

It is important to note that Petitioner's action was against some forty two defendants, including members of his immediate family, former members of Congress, various federal officials and agencies, and several attorneys (some of whom formerly represented Petitioner).

The importance of the RICO alleged oil conspiracy can not be over emphasized. While Petitioner's claim prayed only for pro rata monetary damages for loss of his oil rights, which exceeded four and one half billion dollars, the ramification over oil from this basin concerns what has been estimated to exceed one and one half billion barrels of oil have been estimated to exceed one and half trillion barrels of oil. Minerals Management Service, Pacific OCS Region, Message from the Regional Manager, published 3/17/2005. The manager indicated the region has been 'an important contributor to the Nations hydro-carbon inventory, with over 1.106 billion barrels of oil and 1.33 trillion cubic feet of gas, have already been produced, and estate about 362 million barrels of oil and over 1.09 trillion more cubic feet of natural gas remain.

Likewise an MMS Press Release, dated March 10, 2005, indicates the area produces almost 29% of the oil and 25% of the natural gas in the United States. The message gives as an example, of advances in extended-reach drilling and completion technology, "One example is found in the Santa Ynez United, off Santa Barbara County, Exxon Mobil has drilling 12 extended-reach wells into their Sacate field,...from existing Platform Heritage, over 4 miles away. Those wells, "hold the distinction of having the greatest measured depth (over 24,500 feet),...and longest horizontal distance from surface location to total depth of any off-shore well in the Pacific Region...Several more wells are planned as part of this project.

As a result concerns about subsurface marine rights and surface rights on the island, no longer are

affected by such operations. In fact, sitting off shore within 4 miles of the 3 mile limit around the island, the companies can now sink so called 'submarine wells, without any platform at all and drill under neath the sub surface amazing depths so that the entire operation can removes the entire reservoirs of oil under not only Santa Cruz Island, but the entire basin all without any visible interruption above three hundred feet below the subsurface. Environmental concerns are no longer a problem. Valuation technology is sufficiently developed to provide reliable estimates of the total oil potential.

Moreover, all the island and the shore are now connected by spiderlike extension of subterranean oil lines, primarily destined to platform Grace, where Australia and Japan, are actively seeking permits to ship natural gas offshore, to land based facilities, causing a California Assembly member, to complain: "Its part of an overall scheme by the Bush Administration to show complete disregard for California, and its regulatory process," an assertion remarkably similar to the "enterprise allegation" in the present action. The ramification over the oil extracted from this basin, both nationally and world wide are attributed by some as the central cause of the recent conflict in Iraq and the corresponding world energy crisis.

The effect of valuation of extracted oil and extent of oil reserves within the geological scope of the Gherini Ranch, in which Petitioner's one third undivided interest is located, occupying over 6000 acres on the east end of Santa Cruz Island, containing many oil

seeps presently active, necessarily reveals the nature and scope of the total oil conspiracy of which Petitioner's loss is only a small part. Yet investigation and exposure for valuation of Petitioner's interest, would likely expose the entire RICO enterprise to public scrutiny.

CONCLUSION

For all the foregoing reasons, the writ should issue as prayed.

March 20, 2008

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-55709
D.C. No. CV-04-08247-AHM

[Filed November 9, 2007]

FRANCIS DENBY GHERINI, individually and as a Successor in Interest to the Estate of Inez Gherini, deceased,	)
Plaintiff-Appellant,	)
v.	)
ROBERT J. LAGOMARSINO; STANLEY T. ALLBRIGHT, individually; EDWARD HABERLIN, individually; COUNTY OF SANTA BARBARA; ROGER M. SULLIVAN; SULLIVAN WORKMAN AND DEE, a Law Firm; JOHN GHERINI, individually and as Executor of the Estate of Pier Gherini, deceased; JOY RYAN, individually; CHARLES CUMMINGS; ANDREA GHERINI GALLNT; CATHERINE GHERINI BEAUCLAIR; THEODORE ENGLAND; DAVID SHEA; DAVID TREDWAY; FERGUSON CASE ORR PATERSON & CUNNINGHAM LLP;	)

MICHAEL R. SMENT; DEAN M. WARD; PAUL FRIMMER; GHERINI FAMILY HOLDINGS LLC; FRED ROSENMUND; OXNARD HOLDING COMPANY; DON L. CARLTON, INC.; STEVEN HINTZ, individually; HENRY WALSH, individually; ARTHUR GILBERT, individually; COHEN ENGLAND & WHITFIELD; MARLA DAILY, individually and as Officer of Santa Cruz Island Foundation, Santa Cruz Island Company and The Nature Conservancy; DEPT. OF ENERGY; UNITED STATES DEPARTMENT OF JUSTICE, DEPARTMENT OF INTERIOR; DIANE ELISTROM DEVINE, individually and as Officer of the Nature Conservancy; FEDERAL ENERGY REGULATORY COMMISSION, Department of Energy; TOM GHERINI, individually and as Executor of the Estate of Pier Gherini; NATIONAL PARK SERVICE; STATE OF CALIFORNIA; THE NATURE CONSERVANCY; VENTURA COUNTY SUPERIOR COURT; WILLIAM H. EHORN, individually and as Office (NPS); ANDREA SEASTRAND, individually and as member of California State of Assembly (1990-1994) and United States Congresswoman (1995-1997); TIM SETNEKA, individually and as Official (NPS); UNITED STATES OF AMERICA; SUPERVISING CLERK, FISCAL DEPARTMENT U.S. DISTRICT COURT,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted November 5, 2007
Pasadena, California

Before: B. FLETCHER, REINHARDT, and RYMER, Circuit Judges.

MEMORANDUM*

Francis Denby Gherini appeals the district court's dismissal of his action pursuant to Fed. R. Civ. P. 12(b)(6). We affirm.

The district court dismissed Gherini's action with prejudice on the ground that it lacked subject matter jurisdiction due to the "probate exception" to federal jurisdiction. Following the Supreme Court's subsequent decision in *Marshall v. Marshall,* 547 U.S. 293 (2006), however, that ground is no longer valid. Gherini's first amended complaint asserts RICO and tort claims and seeks an *in personam* damages judgment against the defendants themselves; it does not seek to administer an estate, probate a will, or otherwise assume *in rem* jurisdiction over property in the custody of a state probate court. Therefore, the probate exception does not deprive the district court of subject matter jurisdiction over Gherini's claims. *See Marshall,* 547 U.S. at 311-12.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Nevertheless, we may affirm the district court's grant of a motion to dismiss on any ground supported by the record. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006). We hold that the district court lacks jurisdiction over Gherini's RICO claim for two reasons. First, Gherini does not have standing to bring his RICO challenge. Because he never had a property interest in the Gherini Ranch, Gherini was not "injured in *his* business or property by reason of a [RICO] violation." 18 U.S.C. § 1964(c) (emphasis added). Second, because Gherini alleged no injury to his own business or property, his RICO claim is insubstantial. *See Markham v. United States*, 434 F.3d 1185, 1188 (9th Cir. 2006).

Because the district court lacks subject matter jurisdiction over Gherini's federal claim, it has no discretion to exercise supplemental jurisdiction over Gherini's remaining state-law claims. *See Skysign Int'l, Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1118 n.7 (9th Cir. 2002) ("[H]ad Skysign lacked standing to bring its federal claim, the district court would have lacked subject matter jurisdiction over that claim and accordingly would have had no discretion to hear the state law claims."); *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995) (noting that supplemental jurisdiction exists only "when the federal claim is sufficiently substantial to confer federal jurisdiction," and that an insubstantial federal claim "divest[s] the court of [supplemental] jurisdiction"); *see also* 28 U.S.C. § 1367(c)(3) (giving district courts discretion to decline to exercise supplemental jurisdiction where "the district court has dismissed all claims *over which it has original jurisdiction*") (emphasis added).

Accordingly, the district court's dismissal of Gherini's action is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55709
D.C. No. CV-04-08247-AHM

[Filed November 9, 2007]

FRANCIS DENBY GHERINI, individually and as a Successor in Interest to the Estate of Inez Gherini, deceased,	)
Plaintiff-Appellant,	)
v.	)
ROBERT J. LAGOMARSINO; et al.,	)
Defendants-Appellees.	)

JUDGMENT

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Recrod from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Friday, November 9, 2007

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 04-8247 AHM (SHx)

[Filed April 13, 2005]

Francis Denby Gherini, individually, and as Successor in Interest to Estate of Inez Geherini, deceased	)
Plaintiff	)
v.	)
Robert J. Lagomarsino, individually and as California State Senator (1961-1974) and United States Congressman (1974-1992); Andrea Seastrand individually, and as a member California State Assembly (1990-1994) and United States Congresswoman (1995-1997); The United States; Department of Interior; Department of Justice; Department of Energy; National Park Service (NPS); State of California; County of Santa Barbara; Ventura County Superior Court; William H. Ehorn, individually and as official (NPS); Tim Setneka, individually, and as official (NPS) Stanley T. Albright, individually and as	)

official (NPS); Edward Haberlin,)
individually, and as official (NPS); Joy Ryan,)
individually, and as United States Attorney)
Department of Justice; Doe 1, individually,)
and as Clerk, United States District Court;)
Federal Energy Regulatory Commission;)
Department of Energy; Steven Hintz,)
individually, and as Judge Ventura County)
District Court of Appeal, Second District;)
The Nature Conservancy, a corporation;)
Diane Elistrom Devine, individually, and as)
officer of The Nature Conservancy; Marla)
Daily, individually, and as officer Santa)
Cruz Island Foundation, Santa Cruz Island)
Company, and The Nature Conservancy;)
John Gherini, individually and as officer,)
Santa Cruz Island Company, a Corporation;)
Tom Gherini, individually, and as executor)
of Estate of Pier Gherini; Roger M. Sullivan,)
individually and as partner Sullivan,)
Workman & Dee; Charles Cummings,)
individually and as partner in Sullivan,)
Workman & Dee Sullivan Workman & Dee;)
Andrea Gherini Gallant, individually, and as)
attorney, Sullivan, Workman & Dee;)
Catherine Gherini Beauclair; Theodore)
(Ted) England, individually, and as partner,)
Chohen, England and Whitfield; David)
Shea, individually, and as partner, Ferguson)
Case, Orr, Paterson & Cunningham, LLP;)
David Tredway, individually, and as partner,)
Ferguson, Case, Orr, Patterson &)
Cunningham, LLP; Michael Sment; Dean M.)
Ward; Paul Frimmer; Gherini Family)
Holdings, LLC; Fred Rosenmud, individually)

and as officer, Oxnard Holding Co., Inc.;)
Oxnard Holding Company Inc.; Don L.)
Carlton, Inc; Does 2-10)
)
Defendants)
)

Proposed Judgment of Dismissal of All Claims, All Defendants And The Action With Prejudice

To Plaintiff and to his Attorney of Record:

You will please take notice that pursuant to the Orders dismissing all claims and all defendants with prejudice entered by this Court on March 21, 2005, the Court herein now enters a Judgment of Dismissal of all claims, all defendants and the action, with prejudice.

DATED: April 13, 2005

/s/
UNITED STATES DISTRICT JUDGE

Presented by:

DEBRA W.YANG
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Sara R. Robinson
SARA R. ROBINSON
Assistant United States Attorney

Attorneys for Defendants
Lagomarsino, Clark, Allbright,
Haberlin and Ryan

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 04-8247 AHM (SHx)

Date March 21, 2005

Title *FRANCIS DENBY GHERINI v. ROBERT J. LAGOMARSINO, et al.*

Present: The Honorable A. Howard Matz, U.S. District Judge

Stephen Montes	N/A	N/A
Deputy Clerk	Court Reporter /Recorder	Tape No.

Attorneys NOT Present for Plaintiffs:

Attorneys NOT Present for Defendants:

Proceedings: (IN CHAMBERS)

Introduction

This matter is before the Court on six separate, but largely overlapping, motions to dismiss.[1] Plaintiff, Francis Denby Gherini ("Denby," "Denny," or "plaintiff"), has submitted a sprawling, confusing, and sometimes inconsistent fifty-two page first amended complaint ("FAC") against forty-two defendants, including members of his immediate family, former members of Congress, various federal officials and agencies, and several attorneys (some of whom formerly represented plaintiff). Plaintiff attempts to allege three causes of action, each against all defendants: (1) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO), 18 U.S.C.

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[1] Two additional motions to dismiss are on calendar for April 4, 2005, and April 11, 2005.

§§ 1962(a)-(d);[2] (2) tortious interference with the right to inherit;[3] and a common count.

The Court dismisses this action with prejudice, for lack of subject matter jurisdiction.

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[2] In his first cause of action, FAC ¶¶ 13-66, plaintiff refers to § 1962 (the RICO claim); the Civil Rights Act of 1964,42 U.S.C. § 1983; and 15 U.S.C. § 1503 (omitted pursuant to §2(b)(2) of Reorg. Plan No. 3 of 1979,44 F.R. 69273, 93 Stat. 1381, set out in the Appendix to Title 5, Government Organization and Employees). This cause of action was pled in violation of Federal Rule of Civil Procedure 8(a), which requires a short and plain statement of the grounds on which the court has jurisdiction and a short and plain statement of the claim showing that the plaintiff is entitled to relief. Although this cause of action purports to raise claims under three federal statutes (one of which is defunct), the Court will construe this cause of action as it is framed by plaintiff's prayer for relief, FAC at 52, as one brought pursuant to RICO.

[3] California courts have not recognized a cause of action for tortious interference with an expected inheritance or gift. *See Hagen v. Hickenbottom*, 41 Cal.App.4th 168, 173 (Cal.App. 1995) (noting, in *dicta*, that intentional interference with an expected gift or inheritance has not been "validated" in California). *In re Estate of Legeas*, 210 Cal.App.3d 385 (1989), which suggested otherwise, was ordered depublished.

Plaintiff's Claims and Argument

In his opposition[4] plaintiff attempts to summarize the "central gist" of his FAC. He writes,

> The central gist of the first amended complaint, is the serious allegation, the United States, through its departments and agents, with the private defendants embezzled, and extorded [sic], in violation of RICO and the US Constitution, almost the entire oil reserves of the Santa Barbara/Ventura geologic oil basin, and surrounding three mile offshore limits of not just the Channel Islands, but the Continental coast, containing the sandy Miocene level access to most major reservoirs. The United States, then sells the oil and gas supplies through so-called federal off-shore leases to the major oil companies, for hugh [sic] profits .... completely defeating the land and off-shore property rights of both the land owners, and the entire citizenry of California, without paying for them.... *[O]n the death of [plaintiff's] parents, a pro-rata share of these oil rights would have passed through the estate of Inez Gherini, his mother, to the Plaintiff, had they not been controlled by and diverted to the United States, by the predicate acts listed in the FAC....* As a result, Plaintiff has both standing and

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[4] In lieu of filing six distinct oppositions, plaintiff filed a single fifteen-page "consolidated memorandum in opposition to all six defense motions to dismiss." The memorandum fails to address most of the arguments raised by defendants.

> direct causative loss of property worth over $550,000,000.00 diverted by the predicate acts to and acquired by the United states [sic].

Opp'n at 3-5 (emphasis added). Plaintiff is mistaken; his complaint, while superficially alleging a RICO claim, is simply another attempt to undermine determinations already made by the California Superior Court, Ventura County (the probate court).

Plaintiff's FAC, replete with references to probate proceedings, reveals the true nature of his claim. In his own words, plaintiff brings this action as "heir, Beneficiary, and successor In Interest to the Estate of Inez Denby Gherini, deceased." FAC ¶¶ 4 & 14.[5] According to plaintiff, the following events and facts frame his action: On December 3, 1996, plaintiff's father, Francis, recorded a gift deed of one-percent of undivided interest in the Gherini Ranch to the Santa Cruz Island Foundation reserving a nonexclusive easement in gross to himself and his heirs. *Id.* ¶¶ 30,

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[5] Plaintiff's immediate family, central to his allegations, consists of Inez Denby Gherini (mother, deceased), Francis Ambrose Gherini (father, deceased), Andrea Gherini Gallant (sister), and Catherine Gherini Gallant (sister). (It appears that Catherine's name is actually Catherine Gherini Beauclair. *See* Request for Judicial Notice, Ex. I at 2.)

32, & 37.[6] Plaintiff's mother, Inez, held a community property interest in the portion of the Gherini Ranch held by Francis. *Id.* ¶ 35. Inez and Francis created the 1989 Gherini Family Revocable Trust (*"Gherini 1989 Trust"*) and individual wills that "poured over" into the *Gherini 1989 Trust*. *Id.* ¶ 39. Under the terms of the *Gherini 1989 Trust*, plaintiff's share was to pass to him in trust, whereas his sister's shares passed to them outright. *Id.*[7] On May 21, 1991, Francis, despite his wife's community property interest in the ranch and without his wife's knowledge, conveyed his interest in the ranch into a 1990 Separate Property Trust (*"Francis Gherini 1990 Trust"*). *Id.* 36 & 39. (Francis allegedly amended the *Francis Gherini 1990 Trust* in order to make Inez, Andrea, and Catherine co-trustees. *Id.* ¶ 39.)

Sometime before Francis's death in 1999, Inez created a "holographic will" the purpose of which was to leave her community property (*i.e.*, all the property not otherwise held in trust) to her children,

> including [plaintiff], *outright of any trust* . . . . The effect was to eliminate any trusts, and with

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[6] The former Gherini Ranch occupied 6,200 acres of Santa Cruz Island (ten-percent of the island). Francis retained a twenty-five percent interest in the ranch until February 10, 1997, when the United States acquired this interest pursuant to a legislative taking. FAC ¶¶ 15, 29, 34.

[7] The FAC also mentions a postnuptial agreement, between Inez and Francis, that affirmed the community property status of the Gherini Ranch and all of the elder-Gherini's property. FAC ¶¶ 39, 40.

> the entire estate agreed to be community property under the postnuptial agreement], when Francis died, his share passed to . . . Inez[,] . . . and *when Inez [died] . . . the entire estate passed under her holographic will, one third to [plaintiff] outright.* The[] reported estate was valued at 18 million dollars, and upon recovery of other assets including, most importantly, the oil and mineral rights one third of which were valued over half a billion dollars, *[leaving Plaintiff] with a reasonably expected outright inheritance, [sic] of over five hundred fifty million dollars* . . . .

Id. ¶ 39 (emphasis added).

Francis Gherini's interest in the Gherini Ranch was terminated pursuant to a legislative taking on or about February 10, 1997. *Id.* ¶ 34. The issue of just compensation for that taking was litigated in federal court and eventually submitted to a jury. *Id.* ¶ 38. (Plaintiff refers to this as the "condemnation proceeding.") Andrea Gherini Gallant and Roger M. Sullivan (of the law firm Sullivan Workman & Dee) were, among others, counsel for the defendants in that action. *Id.* ¶ 34. On February 5, 1999, a jury awarded Francis $12,783,418.00 as just compensation. *Id.* ¶ 40. On April 28, 1999, before this sum was paid, Francis died. *Id.* ¶ 41. At some point thereafter, the parties to the condemnation proceeding stipulated to dismissal of an appeal filed by the United States and to a settlement for the full amount of the jury award. *Id.* The amount was transferred into a trust account of Sullivan Workman & Dee and the law firm extracted legal fees and costs from that account. *Id.* According to

plaintiff, this transfer of the settlement award into the law firm's trust account should never have occurred and was accomplished because Andrea concealed Inez's holographic will and the postnuptial agreement (the two instruments that plaintiff contends removed all of the settlement proceeds out of trust). *Id.* ¶ 44. Plaintiff alleges that, "*By reason of his lost inheritance*, [he] has been damages [sic] in a sum in excess of one billion dollars . . . ." *Id.*

After Inez's death, Catherine petitioned the California Superior Court for a determination of whether the filing of a petition to be appointed trustee in both trusts would violate the "no contest" provisions of those trusts. *Id.* ¶ 46. The court determined that it would, but that Catherine was already a co-trustee of the *Francis Gherini 1990 Trust*. *Id.* Plaintiff then filed a number of petitions in California Superior Court, including a petition to probate Inez's holographic will, requests for accountings of the various trusts, and a request for inclusion of the oil and mineral rights of the Gherini Ranch in the *Francis Denby Trust*. *Id.* ¶ 47. The last petition, for the inclusion of the oil and mineral rights, was removed to federal court. *Id.* During the pendency of this removed claim, plaintiff's counsel, Michael Sment, was discharged and replaced by one Dean M. Ward. *Id.* ¶¶ 47 & 49. Ward stipulated to remand the removed claim and obtained plaintiff's signature to that end. *Id.* ¶ 50. (Upon remand Ward advised plaintiff that the issue of the inclusion of the mineral rights could only be raised in a fraud action seeking to set aside the condemnation award, but that plaintiff was barred from doing so by the statute of limitations. *Id.* ¶¶ 49 & 50.)

On August 14, 2001, Ralph E. McCarthy (plaintiff's counsel in this action) appeared in "Ventura County Superior Court, Probate Department," on the hearing for the abovementioned petitions. *Id.* ¶ 51. The judge denied each without prejudice. *Id.* McCarthy then filed a civil suit for "Tortuous [sic] Interference With Inheritance" and a petition, in probate court, for removal of trustee and accounting. *Id.* The civil action was dismissed for lack of subject matter jurisdiction, and transferred to the probate court with leave to amend as to certain attorneys named as parties. *Id.* Plaintiff's attempt to amend his probate petition with the claims from his civil action was denied and the issue of accounting and removal of trustee was the subject of a thirty-two day trial. *Id.* ¶ 52. The FAC refers to some other state court rulings in allegations that are incomprehensible. It goes on to allege as well that at some point there was an appeal that led to an "outrageous ruling . . . the net result of the Courts [sic] desires to maintain *exclusive jurisdiction* over probate matters, with no jury trial of probate attorneys." *Id.* ¶ 53 (emphasis added).

Plaintiff contends that these extensive court proceedings were part and parcel of a RICO violation the purpose and result of which was to deprive plaintiff of his "lost inheritance," *id.* ¶ 54, and that "[h]is sisters should be estopped by reason of their wrongful and criminal acts from claiming any portion of the estate, and should be ordered to restore and disgorge all assets of the estate they have received." *Id.* ¶ 55. *See also id.* ¶¶ 67-69 (claim for tortious interference with right to inherit).

Judicial Notice of Prior Actions

A. *Gherini v. Gallant, et al.*, CN 214669: On December 13, 2002, plaintiff filed a first amended complaint in California Superior Court, Ventura County. Request for Judicial Notice, Ex. D at 1. That complaint alleged tortious interference with right to inherit, "statutory violations," and a common count, and sought a constructive trust. The complaint named Andrea Gherini Gallant; Ted England; David Shea; Ferguson, Case, Orr, Patterson & Cunningham LLP; Fred Rosenmund; Oxnard Holding Company, Inc.; and Don Carlton, Don L. Carlton, Inc., all defendants in the present action, as defendants. That action was based on plaintiff's contention that pursuant to the *Gherini 1989 Trust* (and amendments), the individual wills of Francis and Inez, the *Francis Gherini 1990 Trust* (and amendments), a letter regarding the status of the elder Gherini's community property, and Inez's holographic will, "[plaintiff] has a clear inheritance expectancy . . . of at least one third of all assets of his parents estate, including the Gherini Ranch. . . ." *Id.* ¶¶ 8-9. The harm alleged was tortious interference with plaintiff's right to inherit. *Id.* ¶ 10. On February 13, 2003, Judge Henry J. Walsh held a hearing on demurrers filed by each defendant. *Id.*, Ex. G at 1. The court sustained the demurrers of Andrea Gherini Gallant, Don Carlton, and Don Carlton Inc., for lack of subject matter jurisdiction, and sustained the demurrers of England, Shea, and Ferguson, Case, Orr, Patterson & Cunningham LLP, Fred Rosenmund and Oxnard Holding Company, Inc. with leave to amend. *Id.* at 2.

The Court of Appeal of the State of California affirmed the Superior Court's entry of judgment in favor of the defendants following the Superior Court's ruling on defendants' demurrers to the first amended complaint. *Gherini v. Carlton*, 2004 WL 901914, *1 (Cal.Ct.App. 2004); Request for Judicial Notice, Ex. K at 2. The Court of Appeal held that, "Denny has petitioned in probate court to dissolve the Denny Trust, remove Andrea as Trustee, remove certain property from the Trust, and admit the holographic will . . . . The probate court has *exclusive jurisdiction* of these matters and Denny has *chosen* to litigate there." *Gherini*, 2004 WL 901914, *5. The court found that the Superior Court had not abused its discretion by sustaining the demurrer of defendant Rosemund to plaintiff's second amended complaint. *Id.* at *4.

B. *In re Gherini Trust*, 1999, P074417:[8] On August 03, 2004, Judge Steven Hintz, on a matter before the Probate Division of the Superior Court of California, Ventura County, issued a statement of decision in the matter of *In re Gherini Trust*. Request for Judicial Notice, Ex. I at 1. The decision addressed and rejected plaintiff's challenges to the accountings of the *Gherini 1989 Trust*, the *Francis Gherini 1990 Trust*, and the *Francis Denby Gherini Trust* (all presented to the court by Andrea Gherini Gallant as trustee), and plaintiff's petition for removal of Andrea as trustee. That decision, an admirable canvassing of

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[8] On December 3, 2004, this court issued a minute order remanding plaintiff's removal of his own state court action, *In re Gherini Trust*, Case No. P 074417, to the California Superior Court, Ventura County.

the incredible events plaintiff purported to describe in the FAC, construed the following instruments: the *Gherini 1989 Trust* (and amendments); the "pour over" wills of Inez and Francis Gherini;[9] the *Francis Gherini 1990 Trust*; Inez Gherini's "Holographic Document;" and the Francis Denby Gherini Trust.

The probate court made, *inter alia*, the following determinations: (1) "Inez's holographic [w]ill neither revoked nor modified the *Gherini 1989 Trust*[,]" *id.* at 9; (2) under the *Gherini 1989 Trust* and Inez's pour over will, "Inez intended Denny's share . . . to be held in Trust for his lifetime benefit, remainder to Denny's three children[,]" *id.* at 4; (3) the federal condemnation proceeds were "Francis'[s] separate property, subject to administration under the *Francis Gherini 1990 Trust*" and "could not properly be dealt with outside of the *Francis Gherini 1990 Trust*[,]" *id.* at 16-17; (4) "there was no proved fraud or defect in the creation and administration of the *Gherini 1989 Trust*[,]" *id.* at 10; (5) "the allegations of fraud, embezzlement, and other criminal misconduct by Andrea Gherini [Gallant], David Shea, Ted England and others was unsupported by any significant evidence . . . ." *id.*; (6) "there was no proved fraud or defect in the creation

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[9] The court noted that these wills were never put into probate by Andrea Gherini Gallant because "substantially all of the assets were held in Trusts and distributed under the terms and conditions of the respective Trusts. Those amounts not held in Trusts were transferred to Denny. . . directly, pursuant to the procedure set forth in Probate Code § 13100. It was not legally necessary to open a probate for either Francis or Inez since all the assets were held in trust or given outright to Denny." Request for Judicial Notice, Ex. I at 5.

and administration of the *Francis Gherini 1990 Trust*[,]; *id.* at 20; (7) "the handling of the condemnation case immediately after the death of Francis Gherini was neither fraudulent nor detrimental to the financial best interests of Denny[,]" *id.*; and (8) "the payment of fees out of the recovery in the condemnation was appropriate and, in fact, required[.]" *Id.*

The court further noted that the estate plan created by Francis and Inez was rife with potential conflict (a conflict that has now found its way before this Court),

> [t]hat is[,] both Andrea and Catherine were to receive their share outright and *Denny's share was to remain in Trust* for the remainder of his life. Certainly, Denny made no secret that *he wants his share distributed outright and not held in Trust*. His desire to obtain his share fee of Trust is in direct conflict with Francis and Inez's intent.

Id. at 24 (emphasis added). This desire of plaintiff to obtain his inheritance outright is part of the essential relief plaintiff seeks before this court.

The Court Lacks Jurisdiction

The Court finds that it does not have subject matter jurisdiction pursuant to the well-established probate exception to federal jurisdiction. *See* Schwarzer, Tashirna, & Wagstaffe, Cal. Pract. Guide: Fed. Civil. Proc. Before Trial 2B-4 § 2:103.15 (The Rutter Group 2005). In *In re Marshall*, 392 F.3d 1118 (9th Cir. 2004), the Court of Appeals was faced with

conflicting judgments of the Texas Probate Court, the United States Bankruptcy Court, and the United States District Court, "that decide[d] the claim of the surviving spouse [of decedent J. Howard Marshall II] and that affect[ed] the distribution of the net property of the decedent's trust and probate estate." *In re Marshall*, 392 F.3d at 1121. The court held that "all federal courts, including bankruptcy courts, are bound by the probate exception to federal court jurisdiction, and that [federal courts] are required to refrain from deciding state law probate matters, *no matter how the issue is framed by the parties*." *Id.* (emphasis added).

The probate exception to federal court jurisdiction provides,

> that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States[.]

In re Sutton v. English, 246 U.S. 199, 205 (1918). However, "[a] federal court 'may entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims *so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in*

custody of the state court.'" *In re Marshall*, 392 F.3d at 1131 (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946) (internal quotation marks omitted and emphasis added)).

In *In re Marshall*, the Ninth Circuit adopted the analysis employed by the Second Circuit in *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002). *Id.* at 1132. The *Moser* analysis is a two-prong inquiry. The first prong, not relevant here, asks "whether the matter is purely probate in nature, in that the federal court is being asked directly to probate a will or administer an estate." *Id.* at 1133. The second prong, itself a three part inquiry, asks "whether the matter is probate-related by determining whether, by exercising jurisdiction over the matter, the federal court would: (1) interfere with the probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over the property in custody of the state court." *Id.* "If the answer to any of these questions is yes, then the probate exception applies." *Id.*

"[T]he probate exception encompasses . . . questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument . . . . includ[ing] *fraud, undue influence upon a testator, and tortious inteference with the testator's intent.*" *Id.* at 1133 (emphasis added). The probate exception is applicable to wills and "to trusts that direct a post mortem disposition of the trustor's property." *Id.* at 1135.

Application of the *Moser* analysis to this case confirms that this Court does not have subject matter jurisdiction over this action. Plaintiff's claims turn on

the contention that (1) the entire Gherini estate, including Francis's interest in proceeds of the federal condemnation proceeding (which passed to the *Francis Gherini 1990 Trust*) was held as community property by the elder Gherinis, (2) Inez's holographic will eliminated any standing trusts, including the *Gherini 1989 Trust* and the *Francis Gherini 1990 Trust*, and (3) Inez's holographic will passed one-third of her estate outright to plaintiff. FAC ¶ 39. These claims, and others, have been addressed by the probate court. An exercise of jurisdiction by this court over this matter would clearly interfere with probate proceedings. Plaintiff cannot re-litigate the claims, claims he raised before the probate court in this court. *See In re Marshall*, 392 F.3d at 1135.

Further, in *In re Marshall*, the court noted, "'Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters.'" *Id.* at 1136. Here, California Probate Code § 17000 provides the superior court "having jurisdiction over [a] trust . . . with *exclusive jurisdiction* of the proceedings concerning the internal affairs of trusts." Cal. Prob. Code § 17000 (West's Ann. 2003). Under § 17200, the internal affairs of the trust include: determining questions of the construction of a trust instrument, determining the validity of a trust provision, settling the accounts and passing on acts of the trustee, and appointing or removing a trustee. Cal. Prob. Code § 17200(b)(1), (3), (5), & (10) (West's Ann. 2003). Thus, insofar as the probate court's proceedings relate to the internal affairs of the trust, that court has exclusive

jurisdiction over those matters, and any assumption of jurisdiction by this court, as to those matters, would constitute an assumption of the general jurisdiction of the probate. *In re Marshall*, 392 F.3d at 1136-37.

Lastly, although plaintiff's opposition purportedly responded to "all defense contentions in one document," Opp'n at 3, the opposition does not address *In re Marshall* or the probate exception, both of which were clearly raised by the pending motions to dismiss.[10] The Court takes this omission as an implicit admission that plaintiff has no substantive response to the argument that the court lacks subject matter jurisdiction.

Conclusion

The discussion above leads the Court to one simple conclusion; this Court lacks subject matter jurisdiction over plaintiff's action. The relief plaintiff seeks, as laid out in the FAC, cannot be granted without interfering with matters either already settled in probate court or exclusively within the probate court jurisdiction. *See Sunon v. English*, 246 U.S. 199, 205 (1918). The Court GRANTS WITH PREJUDICE each of the six motions on calendar for today, March 21, 2005, and the two pending motions to dismiss.[11]

_____:_____

Initials of Preparer /s/_____

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[10] *See, e.g.*, Andrea Gherini Gallant and Don L. Carlton, Inc.'s Motion to Dismiss at 15-17.

[11] Docket Nos. 22, 29, 32, 33, 36, 46, 50, 54.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55709
D.C. No. CV-04-08247-AHM

[Filed December 21, 2007]

FRANCIS DENBY GHERINI, individually and as a Successor in Interest to the Estate of Inez Gherini, deceased,

Plaintiff-Appellant,

v.

ROBERT J. LAGOMARSINO; STANLEY T. ALLBRIGHT, individually; EDWARD HABERLIN, individually; COUNTY OF SANTA BARBARA; ROGER M. SULLIVAN; SULLIVAN WORKMAN AND DEE, a Law Firm; JOHN GHERINI, individually and as Executor of the Estate of Pier Gherini, deceased; JOY RYAN, individually; CHARLES CUMMINGS; ANDREA GHERINI GALLNT; CATHERINE GHERINI BEAUCLAIR; THEODORE ENGLAND; DAVID SHEA; DAVID TREDWAY; FERGUSON CASE ORR PATERSON & CUNNINGHAM LLP;

MICHAEL R. SMENT; DEAN M. WARD; PAUL FRIMMER; GHERINI FAMILY HOLDINGS LLC; FRED ROSENMUND; OXNARD HOLDING COMPANY; DON L. CARLTON, INC.; STEVEN HINTZ, individually; HENRY WALSH, individually; ARTHUR GILBERT, individually; COHEN ENGLAND & WHITFIELD; MARLA DAILY, individually and as Officer of Santa Cruz Island Foundation, Santa Cruz Island Company and The Nature Conservancy; DEPT. OF ENERGY; UNITED STATES DEPARTMENT OF JUSTICE, DEPARTMENT OF INTERIOR; DIANE ELISTROM DEVINE, individually and as Officer of the Nature Conservancy; FEDERAL ENERGY REGULATORY COMMISSION, Department of Energy; TOM GHERINI, individually and as Executor of the Estate of Pier Gherini; NATIONAL PARK SERVICE; STATE OF CALIFORNIA; THE NATURE CONSERVANCY; VENTURA COUNTY SUPERIOR COURT; WILLIAM H. EHORN, individually and as Office (NPS); ANDREA SEASTRAND, individually and as member of California State of Assembly (1990-1994) and United States Congresswoman (1995-1997); TIM SETNEKA, individually and as Official (NPS); UNITED STATES OF AMERICA; SUPERVISING CLERK, FISCAL DEPARTMENT U.S. DISTRICT COURT,

Defendants-Appellees.

Before: B. FLETCHER, REINHARDT, and RYMER, Circuit Judges.

Judge Reinhardt and Judge Rymer have voted to deny the petition for rehearing en banc and Judge B. Fletcher has recommended against rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.